Chapter XI

DECISIONS: DIVISION OF MEDICAL QUALITY

A. Overview of Function and Updated Data

The Medical Board's Division of Medical Quality (DMQ), which consists of fourteen of MBC's 21 members (eight physicians and six public members), is the Board's enforcement arm. As described in prior chapters, it oversees a large enforcement staff and adopts final adjudicative decisions in disciplinary matters against its licensees.

Adjudicative or "quasijudicial" decisionmaking is generally governed by the Administrative Procedure Act (APA).[203] It differs fundamentally from all other types of agency decisionmaking, and the courts and Legislature have adopted special rules to ensure that the due process rights of the respondent — who stands to lose a vested constitutional property right — are preserved. Of import, the burden is on the agency to prove a disciplinable violation by "clear and convincing evidence to a reasonable certainty."[204] Under the APA and constitutional law, the respondent has a right to a written statement of the charges (the "accusation") that sets forth the acts or omissions with which she has been charged with sufficient specificity to enable her to prepare a defense.[205] Thereafter, the respondent is entitled to some discovery rights,[206] a noticed and public hearing[207] at which the respondent may be represented by counsel (at his/her expense), testimony under oath,[208] the right to

[203] Gov't Code § 11370 *et seq*.

[204] *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App. 3d 853.

[205] Gov't Code § 11503.

[206] *Id*. § 11507.6. APA discovery is not as expansive as civil discovery, in that interrogatories and depositions are generally not allowed.

[207] *Id*. §§ 11425.10(a)(3), 11509.

[208] *Id*. § 11513(a).

cross-examine and confront witnesses,[209] the issuance of a formal decision,[210] and judicial review of the agency's decision.[211] Of critical importance, the respondent is also entitled to a decisionmaker who is neutral and unbiased,[212] and who decides the matter based upon evidence that has been lawfully gathered and admitted at a public hearing.[213]

Another mechanism utilized by DMQ and other adjudicative bodies attempts to protect the constitutional rights of the respondent. In imposing disciplinary sanctions, the DMQ panel must consider the Division's "disciplinary guidelines," which set forth the Division's preferred range of sanctions for every given violation of the Medical Practice Act and the Board's regulations.[214] While not binding standards, these disciplinary guidelines attempt to ensure consistency in DMQ decisionmaking — an important component of equal protection.

DMQ is the final decisionmaker in all MBC disciplinary matters in which an accusation has been filed. However, as described above, DMQ does not personally preside over or even attend APA evidentiary hearings; that responsibility is delegated to an administrative law judge (ALJ) from the Office of Administrative Hearings' Medical Quality Hearing Panel (MQHP), who prepares a proposed decision (PD) for DMQ's review. Nor does DMQ negotiate the terms of stipulated settlements that avoid an evidentiary hearing; that responsibility is delegated to its counsel (HQE) and its staff, who negotiate proposed settlements with the respondent and his/her counsel and present them to DMQ for review. DMQ reviews all proposed case dispositions that follow the filing of an accusation — including all PDs (including ALJ recommendations that an accusation be dismissed),

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[209] *Id.* § 11513(b).

[210] *Id.* §§ 11425.10(a)(6), 11425.50, 11517, 11518.

[211] *Id.* § 11523; *see also* Civ. Proc. Code § 1094.5.

[212] Gov't Code §§ 11425.10(a)(5), 11425.40. *See also Gibson v. Berryhill* (1973) 411 U.S. 564; *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.* (1953) 40 Cal. 2d 436; *Allen v. California Board of Barber Examiners* (1972) 25 Cal. App. 3d 1014; and the long series of cases involving the New Motor Vehicle Board, including *American Motor Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal. App. 3d 983; *Chevrolet Motor Division v. New Motor Vehicle Board* (1983) 146 Cal. App. 3d 353; *Nissan Motor Corp. v. New Motor Vehicle Board* (1984) 153 Cal. App. 3d 109; *University Ford Chrysler-Plymouth v. New Motor Vehicle Board* (1986) 179 Cal. App. 3d 796.

[213] Decisions must be made based on evidence lawfully admitted at the public hearing, and not on off-the-record "ex parte" communications with either the presiding officer at the hearing, Gov't Code § 11430.10, or the governmental official or body entrusted with making the ultimate decision, Gov't Code § 11430.70. *See also* Bus. & Prof. Code § 2335(c)(2).

[214] Effective July 1, 1997, Government Code section 11425.50 requires occupational licensing boards to codify their disciplinary guidelines in their regulations. MBC has adopted section 1361, Title 16 of the California Code of Regulations, which incorporates by reference the 2003 version of the Board's disciplinary guidelines.

stipulated settlements, license surrenders, and default judgments.[215] In APA jargon, DMQ is authorized to "adopt" or "nonadopt" proposed case dispositions; in so doing, it is the final judge in the disciplinary matter. It makes the final agency decision which is then subject to judicial review.

For purposes of reviewing PDs, stipulated settlements, and other proposed case dispositions, DMQ divides into two seven-member panels (called "Panel A" and "Panel B"); a proposed case disposition is randomly assigned to one of the panels for review.[216] As presented in Exhibit XI-A below, DMQ panels have reviewed and acted upon an average total of 56 PDs and 200 stipulated settlements each year for the past six years.

Generally, Government Code section 11517 — part of the APA — governs a board's review of a PD. However, special rules apply to a DMQ panel's review of a proposed decision:

(1) A DMQ panel must give "great weight to the findings of fact of the administrative law judge, except to the extent those findings of fact are controverted by new evidence."[217] This "great weight" requirement was added in 1995, and is based on the fundamental premise of American jurisprudence that the "trier of fact" should be the one who sees and hears the witnesses, has an opportunity to observe how they say what they say, and observe their credibility and demeanor.

Despite this "great weight" requirement, it is important to understand that DMQ does not function under any defined standard of review. The ALJ's proposed decision is merely a "recommendation" to Board members serving on the Division. As a matter of law, they may ignore it entirely.

(2) Once MBC receives the PD, it is assigned to a DMQ panel and sent by mail to each panel member within ten calendar days of receipt. Each member must vote whether to "approve the decision, to approve the decision with an altered penalty, to refer the case back to the administrative law judge for the taking of additional evidence, to defer final decision pending discussion of the case by the panel . . . as a whole, or to nonadopt the decision."[218] Four votes are needed to adopt a decision, approve a decision with an altered penalty, refer the case back to the ALJ for the taking of additional evidence, or nonadopt the decision. Two votes will effectively "hold" the proposed

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[215] DMQ does not review interim suspension orders issued by MQHP ALJs; those are final when issued, Bus. & Prof. Code § 2335(b), subject to judicial review, Gov't Code § 11529(h). DMQ also does not review pre-filing public letters of reprimand, license surrenders while on probation, or withdrawn accusations (unless they are part of a stipulated settlement).

[216] Bus. & Prof. Code § 2230(b).

[217] *Id*. § 2335(c)(1).

[218] *Id*. § 2335(c)(2).

decision for discussion of the case at the panel's next meeting. DMQ panel members must return their votes by mail to the Board within 30 days from receipt of the proposed decision.[219]

(3) The DMQ panel must take action on the proposed decision — that is, adopt it or nonadopt it — within 90 calendar days of the date it was received by the Board.[220] If two panel members vote to "hold" a proposed decision for discussion at the panel's next meeting (see above), that meeting must take place within the 90-calendar-day period.[221] If the panel takes no action on the PD within the 90-calendar-day period, the PD becomes final and subject to judicial review.[222]

(4) If the panel believes that the penalty should be more severe than that recommended by the ALJ, the panel must nonadopt the decision within the 90-calendar-day period. Thereafter, it must order a record of the entire administrative proceeding (including a transcript of the hearing and all the documentary evidence), make it available to both parties,[223] and afford the parties an opportunity for oral argument before the panel prior to deciding the case.[224] Following oral argument, four votes are required to increase the penalty proposed by the ALJ, and "no member of the . . . panel . . . may vote to increase the penalty except after reading the entire record and personally hearing any additional oral argument and evidence presented to the panel . . .."[225]

Once a DMQ panel has adopted a final decision and mailed it to the parties, that decision is subject to reconsideration by DMQ "on its own motion or on petition of any party," within specified time limits prior to the effective date of the decision. Thereafter, the decision may be reconsidered by the panel itself or may be assigned to an ALJ.[226]

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[219] *Id*. § 2335(c)(3).

[220] *Id*.

[221] *Id*. § 2335(c)(2).

[222] *Id*. § 2335(c)(3).

[223] Gov't Code § 11517(c)(2)(E).

[224] Bus. & Prof. Code § 2335(c)(4). Under the APA, an agency that considers the penalty proposed by the ALJ too harsh may simply lower it and adopt the decision with the lowered penalty. Gov't Code § 11517(c)(2)(B). An agency that nonadopts a proposed decision because it does not believe the penalty recommended by the ALJ is sufficiently harsh must afford the parties "the opportunity to present either oral *or written* argument before the agency itself." Gov't Code § 11517(c)(2)(E)(ii) (emphasis added). However, a DMQ panel that is nonadopting a proposed decision must afford the respondent an opportunity for oral argument. Bus. & Prof Code § 2335(c)(4).

[225] *Id*. § 2335(c)(5).

[226] Gov't Code § 11521.

Exhibit XI-A below presents recent DMQ activity in two areas — DMQ panel review of proposed decisions and stipulated settlements. It reveals that DMQ adopts most PDs (89% in 2004–05) and approves most stipulations (92% in 2004–05). When it nonadopts a decision, it generally increases the penalty recommended by the ALJ. Recall, however, that increasing the penalty is the only reason a panel must nonadopt a proposed decision — such that a harsher penalty after nonadoption is the expectable result. If the panel believes the recommended penalty is too harsh, it can simply reduce the penalty and approve the decision.[227]

Ex. XI-A. Division of Medical Quality Review of ALJ Proposed Decisions and Stipulations

Activity	FY 1999–2000	FY 2000–01	FY 2001–02	FY 2002–03	FY 2003–04	FY 2004–05
Total ALJ decisions reviewed	53	60	52	57	50	63
ALJ decisions adopted	45 (85%)	49 (82%)	39 (75%)	41 (72%)	42 (84%)	56 (89%)
ALJ decisions nonadopted	8 (15%)	11 (18%)	13 (25%)	16 (28%)	8 (16%)	7 (11%)
Subsequent disposition of nonadoptions	7 increased 1 upheld	8 increased 2 upheld 1 decreased	11 increased 2 upheld	13 increased 2 upheld	6 increased 2 pending	2 increased 1 decreased 1 upheld 2 remanded 1 pending
Total stipulations submitted	198	182	162	218	214	223
Stipulations approved	184 (93%)	171 (94%)	145 (90%)	205 (94%)	203 (95%)	205 (92%)
Stipulations rejected	14 (7%)	11 (6%)	17 (10%)	13 (6%)	11 (5%)	18 (8%)

Source: Medical Board of California

Exhibit XI-B below presents recent DMQ decisions on petitions for reconsideration under Government Code section 11521.

Ex. XI-B. Rulings on Petitions for Reconsideration

	FY 1999–2000	FY 2000–01	FY 2001–02	FY 2002–03	FY 2003–04	FY 2004–05
Petitions filed by Respondent	18	17	9	17	14	20
Petitions Granted	1	1	1	1	1	0
Petitions Denied	17	16	8	16	13	20
Petitions filed by DAG	2	4	4	4	5	3
Petitions Granted	1	3	1	1	4	3
Petitions Denied	1	1	3	3	1	0

Source: Medical Board of California

[227] *See supra* note 224. DMQ rarely reduces a proposed penalty.

Finally, Exhibit X-A above presents DMQ's average cycle time from receipt of a PD to DMQ decision. In 2004–05, DMQ reviewed and reached a final decision on most PDs within 60 days — double its 2003–04 rate of 30 days.[228]

B. The Monitor's Findings and MBC/Legislative Responses

The following summarizes the Monitor's *Initial Report* findings and concerns about DMQ review of proposed disciplinary dispositions, and documents the responses to those findings implemented by the Medical Board, the Attorney General's Office, and the Legislature during 2005. More detail on each of the findings is available in Chapter XI of the *Initial Report*.[229]

1. The added value of DMQ review of proposed decisions is unclear.

In the *Initial Report*, the Monitor noted that, on three prior occasions, legislation has been attempted that would eliminate DMQ review of proposed decisions in favor of permitting the ALJ to make the final agency decision based on the agency's disciplinary guidelines and subject to a petition for judicial review by either side. According to the Monitor, the prior attempts to eliminate DMQ review of proposed decisions were intended to achieve two goals: (1) streamline the decisionmaking process to expedite it for the benefit of both the respondent and the public; and (2) create a limited number of decisionmakers who have both (a) subject matter expertise and (b) independence from the profession — as opposed to the current time-consuming and expensive system where layer after layer after layer of decisionmakers are required to sequentially learn the details of a disciplinary matter.

The Monitor then examined the "qualifications" of the various decisionmakers in the existing process — the administrative law judge who presides over the hearing and receives the evidence (including expert testimony) vs. the DMQ panel that reviews the proposed decision of the ALJ.

The MQHP ALJ is present at the evidentiary hearing, has seen and heard the witnesses, has received all the documentary evidence, and has heard the expert testimony submitted by both sides. This individual is a professional judge — trained in the law and experienced in the judicial process — whose daily job is to preside over evidentiary hearings and draft decisions following those hearings. The judge specializes in physician discipline matters and is familiar with the rules of procedure and evidence in administrative proceedings. Thus, the judge has both knowledge of the evidence and is independent of the profession.

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[228] Medical Board staff speculate that DMQ's average increased in 2004–05 because of the large number of PDs that were mailed to DMQ panel members but "held" for discussion and decision at the next regularly-scheduled meeting of DMQ.

[229] *Initial Report*, *supra* note 13, at 190–98.

DMQ members — volunteers who receive no salary for being on the Medical Board — are physicians and other professionals who meet once every three months for two days. When DMQ members receive a proposed decision in the mail, that is all they have — they have no access to the transcript of the hearing or the evidence presented at the hearing. Unlike jurors in a civil or criminal trial, DMQ members are not present at the hearing. They have had no opportunity to observe the witnesses or judge their credibility and demeanor. They are generally not lawyers or judges, and may have no familiarity with the rules of evidence or administrative procedure. They may not have any familiarity with the subject matter of the particular case; usually have no idea how similar cases have been decided in the past; and often hold the same license as the accused licensee — such that they may have (or may be perceived to have) empathy for or bias against their accused colleague. While DMQ physician members may have medical expertise in a particular specialty, it may not be relevant to the case at hand; in any event, DMQ is confined to the evidence in the record — including the expert testimony of physicians who practice in the same specialty as the accused, have thoroughly examined the evidence, and have been subject to cross-examination.

While volunteer members of occupational licensing boards — which meet infrequently and whose composition changes as terms of board members expire and new members are appointed — may be well-suited to overseeing regulatory programs and adopting "quasilegislative" regulations to govern the practice of a trade or profession, they are less well-suited to making "quasijudicial" decisions that call for intense exposure to and understanding of the evidence in a given matter. DMQ members have full-time jobs and busy lives. The burden of having to read multiple proposed decisions and — when they nonadopt a proposed decision — boxes of hearing transcripts and evidence for each quarterly meeting may be too much to realistically ask of these volunteers. There is no guarantee that all DMQ members read and/or fully understand the proposed decisions or hearing transcripts before voting on disciplinary action. And the time DMQ must spend on fact-finding in individual disciplinary matters leaves less time for other kinds of decisionmaking and activities that are vitally needed and to which the members are better suited, such as rulemaking, policymaking, and oversight of important mechanisms such as the Diversion Program (see Chapter XV).

According to the Monitor, the questionable value of DMQ review and the cost of the current system — including time, money, and lost opportunity costs — seem to outweigh the system's output: the nonadoption of very few proposed decisions (only 7 out of 63 in 2004–05) and the rejection of very few stipulations (only 18 out of 223 in 2004–05). In Recommendation #40, the Monitor suggested that DMQ engage in a public dialogue on the value and costs of DMQ review of proposed decisions.

At its April 22, 2005 meeting, the Board's Enforcement Committee commenced a very preliminary discussion of this issue, and received a background paper from staff outlining possible

options: (1) preserve the status quo; (2) eliminate DMQ review of PDs and allow ALJs to make the final agency decision; (3) require DMQ to review stipulations but not ALJ proposed decisions; (4) require DMQ to review ALJ proposed decisions but not stipulations; (5) adopt the Contractors' State License Board model, wherein the executive director (not appointed board members) reviews and decides whether to adopt proposed decisions and stipulations; and (6) adopt the State Bar's model, wherein proposed decisions drafted by hearing judges are reviewed by a three-member panel of appellate judges within the agency (and not by appointed board members).

The Enforcement Committee entertained brief public comment on this issue. The Attorney General's Office registered strong opposition to the notions of allowing ALJ decisions to become final and eliminating DMQ review. The California Medical Association urged the Committee to conduct further research into the matters raised by the Monitor. Finding that this issue does not appear to require urgent action, the Committee voted to defer this matter until 2006.

2. The consistency of DMQ decisionmaking is unclear.

In the *Initial Report*, the Monitor noted that the fragmented structure of MBC's enforcement program makes it difficult to evaluate the consistency of decisionmaking at any point in the process, including DMQ review. Investigations are handled from eleven different MBC offices; they are funneled into one of six HQE offices and thereafter into one of four OAH offices. Decisionmaking occurs at each of these steps — decisions to close cases, to move them further in the process, to seek disciplinary action, to impose disciplinary action. DMQ decisionmaking is superimposed on all the decisionmaking that occurs below, and it is also plagued with fragmentation. DMQ is split into two panels, neither of which knows of the other's decisionmaking in similar cases. DMQ membership is constantly shifting and changing. There is little or no *stare decisis* — the legal doctrine under which courts adhere to precedent (prior decisionmaking in similar cases) on questions of law in order to ensure certainty, consistency, and stability in the administration of justice — in administrative agency proceedings.

To promote *stare decisis* and consistent decisionmaking over time and across the shifting membership of DMQ panels, Government Code section 11371(c) — enacted in 1993 — required the Office of Administrative Hearings to publish the decisions of the Medical Quality Hearing Panel, "together with any court decisions reviewing those decisions," in a quarterly *Medical Discipline Report*. The intent of the journal was to inform all parties — including licensees, HQE, respondent's counsel, and DMQ itself — of prior DMQ disciplinary decisionmaking in order to promote consistency and encourage settlements. A similar journal instituted at the State Bar in the early

1990s has accomplished precisely that.[230] However, the *Medical Discipline Report* has never been published. Because it has not been published, and because it has been effectively superseded by Government Code section 11425.60 (which precludes a party from relying on or citing to a prior DMQ decision unless the Division has designated it as a "precedent decision"), the Monitor recommended that Government Code section 11371(c) be repealed (Recommendation #43). Section 21 of SB 231 (Figueroa) repeals section 11371(c).

In the *Initial Report*, the Monitor commented on Government Code section 11425.60's "precedent decision" mechanism. Although this ten-year-old mechanism is intended to promote consistency in decisionmaking, encourage settlements, and avoid costly litigation, DMQ has made no use of it other than to discuss its existence at its July 2004 meeting. In Recommendation #41, the Monitor suggested that DMQ more fully explore its "precedent decision" authority and begin to utilize it. In response to this recommendation, DMQ staff says it continuously reviews each final disciplinary decision to determine whether it may be appropriate for designation as a precedent decision.

3. The procedure used at DMQ oral arguments is flawed.

In the *Initial Report*, the Monitor also commented on the unusual procedure employed at DMQ oral arguments on nonadoption — and the Monitor has attended literally hundreds of DMQ oral arguments since 1986. The scenario is as follows: A DMQ panel has nonadopted a proposed decision. The only reason a DMQ panel needs to nonadopt a PD is to consider a harsher penalty than that recommended by the ALJ. So the respondent physician turns into a petitioner — pleading with the panel to either leave the ALJ's proposed penalty alone or lower it, but certainly not to increase it. That respondent must be mystified when he arrives at the hearing to find that the Board is represented by its own counsel — HQE. In effect, the "client" agency hears argument from its own counsel, with which it frequently interacts and upon whom it depends for legal advice on a myriad of matters — which must strike the respondent physician as unfair.

Procedurally, the respondent is usually permitted to argue first. The HQE DAG is given equal time to respond, and each side is afforded a brief rebuttal. In making oral argument, the lawyers are required to confine themselves to evidence that is "in the record" — that is, evidence that has been presented at the evidentiary hearing and admitted by the ALJ. The DMQ members have

[230] Rule 310 of the State Bar's Rules of Procedure requires the Bar to compile final disciplinary decisions of the Bar's Review Department (an appellate review body within the Bar) into a *California State Bar Court Reporter*; these decisions are binding on the Bar's hearing judges who preside over evidentiary hearings in attorney discipline matters. Note that the State Bar is not subject to the APA and does not use OAH ALJs at attorney discipline hearings; the Bar has its own staff of hearing and appellate judges who specialize in attorney discipline matters. Note also that the State Bar Board of Governors does not review final disciplinary decisions made by the appellate Review Department; those are reviewable only by the California Supreme Court.

all of this evidence, because in nonadoption cases the entire transcript and record of the evidentiary hearing are ordered and delivered to all panel members, and by law all of them are required to read the entire record and personally hear any additional oral argument and evidence presented to the panel before voting on the nonadoption.[231] However, counsel do not always confine themselves to the record, and an objection to the argument may be voiced — requiring a legal ruling on the objection.

Historically, the chair of the DMQ panel — usually a physician, usually (and understandably) not well-versed in litigation procedures or accustomed to responding instantly to evidentiary challenges — presided over these oral arguments and was expected to rule on objections. On those occasions, in-house MBC lawyers would attempt to assist the panel chair in ruling on objections. Inasmuch as those individuals generally report to the prosecutor in the matter (MBC's executive director), that procedure left something to be desired. Due to these problems and the considerable mischief that resulted, 1995's SB 609 (Rosenthal) required MBC to adopt regulations governing the procedure at oral arguments,[232] and those regulations now require an ALJ to preside at oral argument.[233] Of course, this cannot be the same ALJ who presided over the hearing and whose decision was nonadopted in the matter at issue, so the ALJ presiding at oral argument necessarily has little or no knowledge of the sometimes voluminous record in the underlying matter. As opposed to the panel chair, this judge might be somewhat more successful in controlling the proceeding, ruling on objections, and requiring counsel to cite to the record when there is a question as to whether argument is based on the record. However, the required presence of the ALJ adds more expense to this process, and interrupts the hearing schedule of that MQHP ALJ.

Then, in what is by far the most unusual aspect of the proceeding, the respondent himself must be given an opportunity to personally address the panel,[234] and members of the DMQ panel are permitted to question either counsel or the respondent. Neither the statute nor the regulation requires that the respondent be put under oath when he makes this statement or answers questions. Respondents sometimes stray from the record and/or the topic at hand, and are subject to objections. Well-meaning DMQ panel members often ask questions outside the record, and are subject to more objections.

To the outside observer, the entire DMQ review process seems fraught with (1) apparent conflict of interest; (2) delay in a context where delay may cause irreparable harm; (3) extraordinary

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[231] Bus. & Prof. Code § 2335(c)(5).

[232] *Id*. § 2336.

[233] 16 CAL. CODE REGS. § 1364.30.

[234] *Id*. § 1364.30(e).

expense to the Board, the respondent physician, and the physician population whose license fees support the Board's enforcement program; and (4) uncertainty and potential unfairness that can result when non-judges with no assured knowledge of the evidence and who function under no defined standard of review are asked to second-guess the findings and conclusions of a professional judge in a profoundly significant legal proceeding.

Since the publication of the *Initial Report*, a superior court has issued a decision illuminating the errors that can result from these unusual procedures designed to accommodate adjudicative decisionmaking by non-judges. In its decision, the court found that certain procedural aspects of the DMQ review process denied one physician a fair hearing, vacated DMQ's decision revoking that physician's license, and remanded the matter to the Division for further proceedings.[235] The court took no position on the merits of the matter — that is, the court did not decide whether MBC sustained its burden of proof and/or whether the physician should be disciplined; neither does the Monitor. The Medical Board does not intend to appeal the court's ruling. The Monitor discusses the case here because it points out significant procedural flaws in the DMQ review process that could be avoided if the ALJ's decision were deemed final.

In this matter, MBC charged a physician with quality of care violations relating to sixteen different patients and one count of unprofessional conduct based on a federal criminal conviction for tax evasion. After a lengthy hearing, the ALJ issued a proposed decision dismissing all of the patient care allegations as unfounded and recommending no discipline for the criminal conviction. A DMQ panel nonadopted the ALJ's decision. In its notice of nonadoption, the panel accepted the dismissal of the patient care allegations but invited argument on "the appropriate penalty for the conviction that was charged in the case, taking into consideration any rehabilitation or mitigating factors."

As is customary after a nonadoption, MBC staff ordered the entire administrative record of the hearing before the ALJ, including the transcripts and the exhibits; received the record; and prepared to mail it to the panel members. However, an attorney for the Board (not the Attorney General's Office but an attorney advisor to the Board) determined that — because the nonadoption had been narrowly limited to the appropriate penalty for the criminal conviction — it was not necessary for the panel to review the entire administrative record. She apparently attempted to isolate the portions of the transcript dealing with "rehabilitation and mitigating factors" for submission to the panel. In so doing, she withheld all of the physician's exhibits from the panel and provided only about 165 pages of the 3,305-page transcript to the panel; she did not advise the physician's counsel that she had redacted the record. This same attorney was present at the panel's

[235] *Kawesch v. Medical Board of California*, No. 04CS00760 (Sacramento County Superior Court; Sept. 14, 2005).

oral argument on the nonadoption, and at the panel's subsequent closed-door deliberation on the matter. During that executive session, panel members instructed her how to rewrite the ALJ's decision. Thereafter, she redrafted the decision pursuant to the instructions given. The redrafted decision indicated that the panel had reviewed "the entire record," including two exhibits that had been redacted from that portion of the record provided to the panel. The attorney forwarded the redrafted decision to the chair of the seven-member panel. The chair reviewed the decision, signed it, and mailed it to the physician. In the decision, the panel revoked the physician's license based on the criminal conviction.

In his petition for writ of mandate, the physician argued that he had been denied a fair trial because the panel had (among other things): (1) improperly delegated its duty to take final disciplinary action to the chair of the panel when multiple statutes require the entire panel to make that decision; (2) revoked his license without reviewing the entire administrative record and without giving him notice that it was not reviewing the entire administrative record, when statute clearly requires the reviewing panel to review the entire record; and (3) permitted the attorney — arguably an agent of the prosecutor — to be present during closed-door deliberations and to engage in *ex parte* communications with panel members acting as judges in a final disciplinary matter.[236] The court agreed that these "significant procedural errors" deprived the physician of a fair hearing, vacated the revocation decision, and remanded the matter to DMQ for further proceedings (from which the panel members who had originally heard the matter, the advising attorney, and the HQE DAG have been disqualified).

Regardless of the eventual disposition of this matter, these are serious procedural issues which occurred because the prosecutorial and judicial functions are not sufficiently separated at the Medical Board. In the Monitor's view, this lack of sufficient separation is not unique to the Medical Board, nor is it confined to these particular issues.[237] These problems also arose because non-judges who have no assured familiarity with the evidence are permitted to assume the role of a judge in a momentous legal proceeding. With all due respect to the intelligence, skills, and good intentions of DMQ members, they are not judges. They do not judge for a living. They have had no training in the process and art of judging. The agency within which they function is not within the judicial branch. In fact, the agency within which they function houses the prosecutor in the proceedings they

[236] The court noted that MBC, citing Business and Professions Code section 2335(c)(2), disputes this issue because the attorney is not an "employee" of MBC. However, section 2335(c)(2) is not the only provision applicable to *ex parte* communications with agency members acting in a judicial capacity. Government Code section 11430.10 *et seq*., which appears fully applicable here, prohibits any "communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee *or representative* of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication" (emphasis added). The court did not address whether any of the exceptions to that statute contained in Government Code section 11430.30 apply here; neither does the Monitor.

[237] *See infra* Chapter XI.B.4.

adjudge — the Medical Board executive director; further, they directly hire and may fire that prosecutor for any or no reason. In conducting the business of the Board, they routinely interact with counsel for the prosecutor (HQE) and with Board employees and advisors who may fairly be called (or perceived to be) agents of the executive director/prosecutor. Apparent conflicts plague this process. In the Monitor's view, it is inappropriate for DMQ members — who lack assured knowledge and understanding of the evidence, a defined standard of review, and independence from the profession they regulate — to participate in adjudicative decisionmaking affecting the legal rights of a state licensee.

The Medical Board has several options. It may choose to retain its existing decisionmaking authority and simply address the procedural flaws identified by the Monitor and in the recent court decision. For example, a Board-sponsored amendment to Business and Professions Code section 2335(c)(4) to allow written argument after nonadoption (in lieu of required oral argument) may put an end to the circus-like atmosphere surrounding some oral arguments. And, theoretically, it is easy to address two of the three bases for the court's decision: MBC must simply follow existing law requiring all panel members to (1) review the entirety of the administrative record following a nonadoption, regardless of the scope of the review upon nonadoption, and (2) review decisions following a nonadoption. It is unclear, however, how MBC will address the issue of who will redraft final agency decisions after nonadoption and oral argument. Obviously, no employee of the prosecutor may interact *ex parte* with the decisionmakers on any matter of substance related to the case[238]; it is not clear whether non-employee attorney advisors may do so.[239] It may be that the ALJ who presides over the oral argument will have to take on this drafting task — at considerable additional expense and delay.

In the alternative, the Board could meaningfully implement Recommendation #40 and — especially in light of the recent decision — engage in an intelligent, public, informed discussion of the costs and value of DMQ review of ALJ decisions together with the advantages and disadvantages of alternative models. The Monitor is aware that many Board members wish to retain their authority to review ALJ recommendations and make disciplinary decisions. However, this is not the universal model. The State Bar Board of Governors does not make disciplinary decisions. The Contractors State License Board does not make disciplinary decisions. If freed from having to spend excessive amounts of time on a function to which they are not necessarily well-suited, and to which others are better suited, MBC members may be able to make greater contributions to public protection by focusing on their important rulemaking, oversight, and general policysetting functions.

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[238] Bus. & Prof. Code § 2335(c)(2); Gov't Code § 11430.10.

[239] *See supra* note 236.

4. DMQ's procedures on motions for a stay in order to seek reconsideration appear unfair.

In the *Initial Report*, the Monitor discussed DMQ's procedures when a party wishes to seek reconsideration of a final decision, as permitted in Government Code section 11521. Exhibit XI-B above reveals DMQ's 2004–05 record on motions for reconsideration: While it rejected all 20 motions filed by respondents, it granted all three motions filed by HQE. Once again, these results appear unfair. However, as discussed in the Initial Report,[240] they are also somewhat expectable and unsurprising. One expects the prosecution to win most of the time a case goes to hearing; an experienced prosecutor with a weak case will settle prior to hearing, while a respondent with a weak case may decide to "roll the dice," go to hearing, and hope for the best rather than stipulating to discipline. One also expects a respondent to "exhaust his administrative remedies" by challenging every order adverse to his interests (which is why respondents petitioned for reconsideration four times more than did HQE over the past six years). Finally, one does not expect DMQ to revisit these matters often — the DMQ panel has already reviewed the PD, perhaps held oral argument on it, and ruled on it. In the absence of serious procedural or substantive error, DMQ will be content to let the matter proceed to court.

The Monitor also discussed Government Code section 11521(a), which permits either side to request a short stay of the effective date of the decision to enable counsel to prepare a motion for reconsideration. While MBC's *Discipline Coordination Unit Procedure Manual* is clear that a motion for reconsideration must be decided by a DMQ panel, it allows MBC enforcement staff to rule on a request for stay (and contains criteria to guide staff's decision whether to grant a stay). In the *Initial Report*, the Monitor agreed with defense counsel that this procedure — wherein an agent of the executive director/prosecutor is able to make decisions affecting the final outcome of a disciplinary matter — appears one-sided and unfair. In Recommendation #42, the Monitor stated that MBC enforcement staff should not rule on those motions and suggested that DMQ address this procedural issue.

In response, MBC staff declined to end its role in ruling on motions for stay. Instead, it is in the process of amending its *Discipline Coordination Unit Procedure Manual* to amplify the criteria to guide staff's decision whether to grant the stay.

The Monitor disagrees with this approach. In 2004–05, MBC received 15 requests for stays. Of those, 14 were filed by respondent's counsel; 12 were denied and two were granted. One was filed by a DAG; it was granted. In other words, MBC's track record on motions for stay is similar to its record on motions for reconsideration generally — motions filed by respondents are usually

[240] *See Initial Report*, *supra* note 13, at 196.

denied, while motions filed by HQE are usually granted. But here, agents of the executive director/prosecutor are making the decision. In the Monitor's view, this appears to be another example of the lack of sufficient separation between the prosecutorial and judicial functions at the Medical Board. As illustrated in the recent superior court decision (see above), agents of the executive director/prosecutor should not even participate in judicial decisionmaking much less engage in it. A recently-adopted DMQ regulation permitting the submission of *amicus curiae* briefs in disciplinary cases requires two panel members to consider and rule on any request to submit an *amicus* brief.[241] If panel members can rule on *amicus* requests within a tight timeframe, there is no reason they cannot similarly rule on requests for stays. The Monitor urges DMQ to properly address this issue and devise a method whereby a panel member is designated to rule on motions for stay.

5. DMQ does not notify both parties if it rejects a stipulated settlement.

In the *Initial Report*, the Monitor noted complaints from defense counsel that DMQ does not always notify both counsel if it rejects a stipulation. It notifies the HQE DAG and expects the DAG to notify defense counsel, which does not always happen promptly. In Recommendation #44, the Monitor suggested that DMQ notify counsel for both HQE and the respondent when it rejects a stipulated settlement. In October 2005, MBC staff amended section 32 of the *Discipline Coordination Unit Procedure Manual* to require this dual notification.

C. Recommendations for the Future

■ ***The costs and value of DMQ review***. The Medical Board should engage in an intelligent, public, informed discussion of the costs and value of DMQ review of ALJ decisions, together with the advantages and disadvantages of alternative models.

■ ***Procedure on requests for stay***. DMQ should adopt a regulation governing rulings on requests for a stay — which regulation ensures that a DMQ member or members rule on those requests, not MBC enforcement staff.

[241] 16 CAL. CODE REGS. § 1364.31(c).